IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No.380 of 2004
in
OFFICIAL LIQUDATOR REPORT No.56 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURAJ ENTERPRISES

Versus

O.L.OF WOOD POLYMERS LTD.

Appearance:

1. COMPANY APPLICATION No. 380 of 2004
MR TANVISH U BHATT for Petitioner No. 1
OFFICIAL LIQUIDATOR for Respondent No. 1
MS NIYATI K SHAH for Respondent No. 2
SINGHI & CO for Respondent No. 2
DS AFF.NOT FILED (N) for Respondent No. 3-6
..... for Respondent No. 7

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 05/11/2004

ORAL JUDGEMENT

This application has been moved seeking the following directions :

"5. In light of the aforesaid premises, the Applicant prays as under:

A. Your Lordship be pleased to direct that composite assets of both the lots of Wood Polymers (In Liquidation) be sold to the Applicant at the price of Rs.315 lacs.

B. In the alternative, Your Lordship be pleased to direct bidding for the composite assets of both lots of Wood Polymers (In Liquidation).

C. Pending notice, admission and final hearing of this Application, Your Lordship be pleased to restrain the respondent No.1 from parting with the possession of the movable assets auctioned in favour of the respondent No.7 by order-dated 14.10.2004 in Official Liquidator's Report no.56 of 2004.

D. Any further relief(s) as deemed fit may be granted to the Applicant

as according to the applicant, the applicant is offering a substantially higher amount for composite properties of Wood Polymers Limited [hereinafter referred to as 'the Company (in liquidation)'].

2. On 14-10-2004 an order came to be made by this Court in O.L.R. No.56 of 2004 whereunder sale of all movable assets excluding land, building and records was confirmed in favour of M/s.Sterling Lam Limited (respondent No.7) for a sum of Rs.178 lacs on the terms and conditions stated in the order. Though the applicant has not made a prayer to set aside the aforestated order before any of the prayers could be granted, if required to be granted, it would be necessary to recall and set aside the order dated 14-10-2004.

3. Mr.Mihir H. Joshi, learned Senior Advocate appearing with Mr.Tanvish U. Bhatt, learned advocate on behalf of the applicant, submitted that the approach of the Court in such matters has to be, to consider as to what is in the larger interest of the body of creditors.

That though numerous attempts since 2000 were made the Sale Committee had not received any offer for land; that in fact there was no serious offer for immovable property. Therefore, it was necessary for the Court to consider whether the offer of Rs.315 crores made by the applicant for all the assets of the Company (in liquidation) should be considered. That the Court must test the offer made by the applicant in context of the bids that had been made in the past and while doing so the Court must bear in mind that the attempt has to be to secure highest amount for composite assets, in other words, try to ensure that most remunerative price is realised. Inviting attention to the OL's Report dated 23-09-2004 it was submitted that as the facts on record would show, the composite offer received by respondent No.1 viz. the Official Liquidator, was to the tune of Rs.281 lacs.

3.1 It was further submitted that the Sale Committee had fixed the composite price and the earnest money deposit in the following lots :

Description			Upset Price	EMD
Lot No.1 i.e. office building	A	Land	Rs.75.00 lacs	Rs.07.50 lacs
	B	All assets other than land	Rs.30.00 lacs	Rs.03.00 lacs
	C	Composite offer for A and B above	Rs.1.05 Crores	Rs10.50 lacs
Lot No.2 i.e. factory building	A	Land	Rs.2.50 Crores	Rs.25.00 lacs
	B	All assets other than land	Rs.1.50 Crores	Rs.15.00 lacs
	C	Composite offer for A and B above	Rs.4.00 Crores	Rs.40.00 lacs

while in fact the sale had been confirmed of all the assets other than land pertaining to both Lot No.1-B and

Lot No.2-B without publicity in relation to such lots. Mr.Joshi, therefore, contended that in such circumstances, even if there was no inadequacy attached to the price realized, it was incumbent upon the Court to consider whether the subsequent offer, viz. the offer made now, for composite assets was reasonable. That for this purpose, it was necessary that the Court should grant an opportunity by probing further so as to ascertain what could be the price that could be fetched if all the assets of the Company (in liquidation) were sold in composite lot. That it was not the submission of the applicant that the applicant alone be permitted to purchase the properties but the Court must invite, if necessary by publication of advertisements, bidders for composite assets of the Company (in liquidation) so as to obtain best possible price of the composite assets. He relied on decisions of Supreme Court reported in (i) (2000) 6 SCC 69; (ii) (2000) 6 SCC 79; (iii) (2000) 6 SCC 82.

4. Mr.Ashok L. Shah, learned advocate appearing with Mr.Dhanvin K. Puj on behalf of respondent No.7, submitted that even before examining the merits of the contentions raised by the applicant the bona fides of the applicant were required to be tested. In this connection he invited attention to the averments made in Paragraph No.2 of the application as well as Paragraph No.6 of the rejoinder affidavit to submit that the applicant had made contrary statements in relation to the business carried on by the applicant, the source of knowledge of the applicant and the circumstances went to show that the present application is filed with ulterior motives and with a view to blackmail and harass respondent No.7.

4.1 Inviting attention to communication dated 18-10-2004 (Annexure-A) it was submitted that on the one hand the applicant was seeking inspection of the unit of the Company (in liquidation) on 20-10-2004 and on the other hand the applicant was already in possession of the order dated 14-10-2004 at 12:03 hrs. on 18-10-2004 itself as could be seen from the computerised copy of the order. Therefore, the applicant was in fact aware that the movable assets of the Company (in liquidation) had already been sold in favour of respondent No.7 and yet was trying to create evidence by the said communication dated 18-10-2004. That the applicant had consciously refrained from stating or bringing evidence on record to show as to when the said communication was tendered in the office of respondent No.1, the Official Liquidator. That prima facie it appeared that the said letter was back dated taking into consideration the fact that the

applicant had made payment of the balance purchase consideration under forwarding letter dated 19-10-2004 by tendering demand drafts for a sum of Rs.1.50 Crores, and Rs.21 lacs (Annexures A, B, and C to the affidavit-in-reply). Mr.Shah further submitted that on the one hand the applicant was seeking inspection of the properties of the Company (in liquidation) and on the other hand he was moving the Court by way of present application offering a price of Rs.315 lacs without even inspecting the properties. That in the entire application it was nowhere stated that pursuant to the said communication dated 18-10-2004, the applicant was granted inspection of all the assets of the Company (in liquidation); that in fact respondent No.1 could not have granted such inspection in light of the fact that on 19-10-2004 the sale was complete when the entire consideration was tendered and the possession of the movable properties passed from respondent No.1 to respondent No.7.

4.2 It was further submitted by Mr.Shah that the present offer was not comparable in as much as the sale was only of all the movable assets, while the applicant was making a bid for composite assets of the Company (in liquidation).

4.3 Inviting attention to provisions of Sections 19 and 20 of the Sale of Goods Act, 1930 (hereinafter referred to as 'the Sale of Goods Act') Mr.Shah submitted that once possession of movable properties was handed over the transaction was complete, respondent No.7 became the owner of the properties and it was not open to the Court also to thereafter disturb the possession and ownership of respondent No.7. That in light of this situation respondent No.7 had already entered into further transaction for sale of such assets as could be seen from Paragraph No.15 of the affidavit-in-reply wherein details regarding seven different parties and the respective amounts received/receivable from the said seven parties have been mentioned.

4.4 It was further submitted that it was not even the case of the applicant that the consideration was inadequate in any manner, and if that be so, it was not open to the Court to disturb a concluded contract. Inviting attention to the decisions of the Apex Court in:

i) Divya Manufacturing Company (P) Ltd. Tirupati Woolen Mills Shramik Sanghaarsha Samity & Anr. Vs. Union Bank of India & Ors. Official Liquidator & Ors., (2000)

6 SCC 69;

(ii) Lica (P) Ltd. Vs. Official Liquidator & Anr. (2000) 6 SCC 79;

(iii) Lica (P) Ltd. Vs. Official Liquidator & Anr. (2000) 6 SCC 82;

it was submitted by Mr.Shah that the Apex Court was dealing with cases involving immovable property wherein the circumstances were that either the sale was yet to be confirmed or that the Sale Deed was to be executed or the appeal was pending, coupled with the fact that Condition No.11 in the said cases permitted the Court to set aside a concluded sale. That in the present case the Court was not required to exercise such jurisdiction in absence of similar condition in the terms and conditions on which the contract was executed by the parties; in other words, no power was reserved with the Court for setting aside a concluded contract. Moreover, the Court had confirmed the sale of movable assets and ownership of property had passed from respondent No.1 to respondent No.7.

4.5 Lastly, it was submitted that the application was also otherwise required to be rejected in light of provision of Rules 10 and 11 of the Companies (Court) Rules, 1959 (the Rules) which specifically provided as to how application is to be made and what applications are to be made in the form of petitions. That Rule 11(a) of the Rules would not apply and hence the application had to be in the form prescribed under Rule 11(b) of the Rules viz. by way of Judge's Summons.

5. Mr.Sandeep Singhi, learned advocate appearing on behalf of respondent No.2, one of the secured creditors, submitted that as could be seen from the Minutes of the Meeting of the Sale Committee held on 03-01-2003, on the basis of the valuation, the lots with schedule had been fixed by the Sale Committee to invite inspection of the properties and offers from interested persons. That even if Lot No.1-B wherein the price was fixed at Rs.30 lacs and Lot No.2-B wherein the price was fixed at Rs.150 lacs were taken into consideration, the consolidated price was Rs.180 lacs against which the sale had been confirmed in favour of respondent No.7 at Rs.178 lacs, which was almost near to the consolidated price and, therefore, it could not be stated that the price realized for all the movable assets of the Company (in liquidation) was in any way inadequate so as to disturb the concluded sale. That even otherwise, if the composite price for Lot No.1-C and 2-C were taken into consideration the composite price was

fixed at Rs.4.75 crores as against Rs.5.05 crores if individual composite price was totalled; against which the present applicant was offering only Rs.3.15 crores. That in case the price realized for the movable properties was deducted from the offer made it yielded a figure of Rs.137 lacs as against the consolidated composite price for land only, of Rs.325 lacs, which worked out to about 40% i.e. Rs.137 lacs were being offered against Rs.325 lacs : land's composite price. In the circumstances, it was submitted that the application was required to be rejected.

5.1 That now only land of the Company (in liquidation) was required to be disposed of and it was common knowledge that open plot of land would always fetch a better return. That with passage of time in future, even after re-valuation, the creditors would be in a position to get better price if the land was otherwise not having any superstructure or any other encumbrance thereupon. That accordingly the offer was far too less and not attractive enough to be taken into consideration.

6. Mr.Mihir Joshi in rejoinder submitted that the contention regarding letter dated 18-10-2004 being back dated or having been filed later in point of time was not stated by respondent No.1 - the Official Liquidator and hence, the said aspect should not be a relevant consideration. Responding to the submission regarding the applicant already being in possession of the order dated 14-10-2004 when the aforesaid letter dated 18-10-2004 was addressed to the Official Liquidator, Mr.Joshi submitted that this issue was never raised earlier in point of time, otherwise the applicant would have tendered appropriate reply. In relation to the contention regarding the contradiction about business of the applicant, it was submitted that the applicant was in the business of trading in steel and plant and machinery were definitely such items which would fall within the business of the applicant. The contention regarding source of information about the properties of the Company (in liquidation) being available was stated to be a business acquaintance at Surat as mentioned in Paragraph No.6 of the rejoinder. The contention that the applicant was making an offer even without taking inspection of the properties was sought to be repelled by submitting that the applicant who was a businessman was taking a business risk which was perceived by the applicant to be in favour of the applicant viz. the applicant would earn out of purchase of such properties. In relation to the contention regarding bona fides of the applicant it was

submitted that the attempt was nothing else but to stall an inquiry and the Court should not permit such an attempt.

6.1 Dealing with the contention that the sale was of movable properties, it was submitted that the contention could not be countenanced that the Court would be helpless in such a situation. That the sale was in terms of provisions of Rules 272 and 273 of the Rules and the Court had inherent powers under Rule 9 of the Rules to ensure that justice is done. It was further submitted that on a conjoint reading of provisions of Sections 19, 64 and 62 of the Sale of Goods Act it was apparent that the said provisions cannot be invoked in absolute terms, and the proposition that the Court would become functus officio once payment was made and delivery taken was too wide to be countenanced. That the Court had to bear in mind the distinction between a confirmed sale and executed sale.

6.2 The technical objection regarding the application not being in prescribed form in light of the Rules 10 and 11 of the Rules was sought to be met by stating that it would be a curable defect and if required, the Court would exercise inherent powers under Rule 9 to permit the applicant to cure such a defect.

6.3 Lastly, it was submitted that the price offered had not to be taken as the final bid and it was to be treated as only the beginning. The test had to be as to whether discretion vested in the Court was required to be exercised in the larger interest of the body of creditors or not.

7. Having heard the parties it is apparent that before deciding as to whether the application requires to be granted or not on facts and circumstances of the case, it is necessary to briefly recapitulate the relevant principles of law relatable to review or recall of an order as well as the position of law by which the Court can interfere with concluded contract by way of auction sale for the purpose of setting aside the same.

8. For the purpose of recalling an order or reviewing an order the jurisdiction that is required to be exercised by the Court has to be on the principles enunciated while exercising jurisdiction under Order 47 Rule 1 of the Code of Civil Procedure, 1908. Order 47 Rule 1 of the Code of Civil Procedure stipulates various contingencies in which an application may be made for review of judgement of this Court. Pre-requisite

conditions prescribed in Rule 1 of Order 47 of the Code of Civil Procedure are :

[i] On discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced at the time when the order was made;

OR

[ii] On account of some mistake or error apparent on the face of the record;

[iii] For any other sufficient reason.

If any one condition is shown to exist an order may be taken up for review. The applicant has not been able to show that the present case would fall within the first situation viz. discovery of new and important matter or evidence. Nor can it be stated that there is some mistake or error apparent on the face of the record which would permit this Court to exercise jurisdiction. In fact the application is silent in this regard and the learned Advocate for the applicant has also not specified the condition on fulfillment of which he is seeking review/recall of the order. The case of the applicant is that there is a better offer made by the applicant and hence the order requires to be reviewed/recalled. The words "any other sufficient reason" appearing in Order 47 Rule 1 of the Code of Civil Procedure must mean a reason sufficient on grounds at least analogous to those specified in the rule. (Ref : AIR 1995 SC 455 and AIR 2000 SC 1650).

9. It is well settled that review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of the Code of Civil Procedure. Even if it is accepted that the Court is empowered to exercise jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it, there are definitive limits to the exercise of the power of review. The power of review is not an inherent power and unless and until it is conferred either specifically or by necessary implication by law, the same cannot be exercised.

10. Applying the aforesaid principles to the facts of the case it is necessary to examine whether the case of

the applicant can fall within any of the conditions prescribed in Rule 1 of Order 47 of the Code of Civil Procedure. Admittedly, it is not the case of the applicant that it has approached the Court on discovery of any new and important matter or evidence which was not within the knowledge of the applicant after the exercise of due diligence. In fact the circumstances do not even indicate as to what was the applicant doing when the Sale Committee published advertisements inviting offers. As can be seen from the report of the Official Liquidator dated 23-09-2004 the first time a decision to invite offers for purchase of the assets of the Company by issuing advertisement was taken on 19-12-2001. Thereafter, as decided at meeting held on 31-01-2002 once again advertisements were published on 15-02-2002. Subsequently as per decision taken in meeting of 03-01-2003 advertisements were published on 16-01-2003. The applicant has not been able to prima facie show as to why and how and in what circumstances the applicant did not respond to any of the advertisements published by the Sale Committee. This becomes important in the context of the averment made by the applicant that "The applicant submits that he is in the business of purchase of land, plant & machinery of various industries.". A person who is in business would definitely be aware of the advertisements published; may be one set of advertisements may be overlooked by a person; to say that advertisements published thrice were not within the knowledge of the applicant is not believable. In fact the applicant does not even state so. The applicant is absolutely silent as to whether he had seen the advertisements or not.

11. In Paragraph No.2 of the application, the applicant further states that the applicant came to know from trade circles that properties of the erstwhile Company are to be sold and, therefore, the applicant inquired about the same "as no recent advertisement" for the same was published in any newspapers. The applicant thereby gives credence to the belief that the applicant was aware that the advertisements had been published in past but no recent advertisement had been published. If that be so, no explanation is forthcoming why the applicant did not participate in any of the proceedings, either before the Sale Committee or before this Court.

12. In light of the various averments made by respondent No.7 in its affidavit-in-reply while dealing with the contentions in Paragraph No.5, the applicant has stated in rejoinder that "..... it is stated that the applicant's business firm is formed in 2003 and is

engaged in the business of trading in steel. Thus, he is not aware of the earlier developments/advertisements in the said matter. The applicant submits that on or about 2nd week of October, while the applicant was in Surat in connection with his business, he was informed by a business acquaintance trading in plywood and timber that there was a good business opportunity. He was informed that the assets of the erstwhile company at Billimora, were up for sale and the project was capable of revival. The applicant was also informed that if he was interested (after a viability report) or in any case the applicant was able to purchase the total assets, then part of it would be assuredly purchased by him. .....". The aforesaid extract would go to show that the applicant, in the rejoinder, is trying to explain away it's inaction by stating that its business was formed in 2003 only and that the applicant was not aware of the earlier developments / advertisements. If this statement is correct what is averred in Paragraph No.2 of the application is incorrect.

13. However, what is more damaging to the case of the applicant is that the applicant was informed in the 2nd week of October at Surat that the assets of the Company (in liquidation) were up for sale and the project was capable of revival. The applicant does not state in the entire application that it is interested in purchasing the composite properties for the purpose of revival of the industry. Each of these factors may independently not be of any significance, but when considered cumulatively, they would reflect adversely on the conduct of the petitioner.

14. Be that as it may. Assuming that these are inconsequential factors and could be ignored, the case of the applicant may be examined in light of the settled legal position by which the Court can interfere with a concluded contract by way of auction sale.

14.1 The applicant has to show that there was some material irregularity and fraud. However, an allegation in this regard is not enough. There must be adequate material to substantiate such allegation. Further, the objector must show that such material irregularity resulted in substantial injury to the Objector. In absence of such pleading and evidence in support thereof it is not open to set aside an auction sale. (Ref. : Shri Ram Maurya V. Kailash Nath and others, AIR 2000 SC 3402 - Shri Ram Maurya Vs. Kailash Nath and others).

14.2 Other factors which would come into consideration

are where the sale is conducted with undue haste without any reserve or upset price being fixed; the valuation itself is suspect and there is inadequate publicity resulting into situation where best possible price was not procured. These factors cumulatively would affect an auction sale and would permit the Court to set aside the same considering the Companies (Court) Rules, 1959. (Ref : AIR 1999 SC 1715 Allahabad Bank etc.etc. Vs. Bengal Paper Mills Co. Ltd. & Others).

14.3 As already stated mere proof of material irregularity and inadequacy of price realized by itself are not sufficient. What the objector has to establish is that not only there was inadequacy of price realized but that, that inadequacy was caused by reasons of material irregularities or fraud. (Ref : AIR 1971 SC 2337 Radhey Shyam Vs. Shyam Behari Singh)."

15. Considering the aforesaid principles it is apparent that on the facts of the case the applicant has not even pleaded that inadequate price has been realized or that there is any material irregularity or fraud in the auction sale confirmed vide order dated 14-10-2004. There is no pleading either that any substantial injury is caused to the applicant. In short, none of the relevant factors are shown to exist cause on facts of the case which would permit this Court to exercise jurisdiction and recall order dated 14-03-2004 for the purpose of setting aside or cancelling the auction sale.

16. There is one more factor which has to be borne in mind. As can be seen from the facts on record the Company (in liquidation) was ordered to be wound up on 14-12-1998. Therefore, admittedly, at least from the said date the assets of the Company (in liquidation) have been lying idle. It is common knowledge and judicial cognizance can be taken of the fact that the plant and machinery which remain idle depreciate at a faster rate and become obsolete in no time. These assets are of such a nature that with every passing day, the realizable value would depreciate. In the circumstances, the contention raised on behalf of the applicant that the Sale Committee ought to have waited for more bidders to come forward with composite offers, or that the Court direct such a course of action today cannot be accepted. It is necessary to bear in mind that funds of secured creditors, who are financial institutions and banks, are held up in such non-performing assets and the earlier they are put in possession of funds realized from disposal of the assets is better for them, because the secured creditors are admittedly dealing with the funds

of the public at large. Hence, in facts of the case, considering the nature of the assets it is not possible to accept the plea of the applicant.

17. In light of the fact that the sale was of movable assets of the Company (in liquidation) provisions of the Sale of Goods Act may also be taken into consideration. Section 2(7) of the Sale of Goods Act defines 'goods' to mean every kind of movable property.

17.1 Section 4 of the Sale of Goods Act defines what is 'Sale' and 'Agreement to Sell'. A contract of sale of goods is a contract whereby seller transfers or agrees to transfer the property in goods to the buyer for a price; such a contract of sale may be absolute or conditional. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. Such an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled to which the property in the goods is to be transferred. It follows that until the property in the goods has been transferred from the seller to the buyer there is no sale. The contract of sale remains merely executory till then; and it becomes executed the moment the property has passed to the buyer.

17.2 Section 19 of the Sale of Goods Act provides as to when the property passes. The section recognizes the rule that in case of an agreement of consideration, whether the consideration consists in some actual performance, as the payment of the price, or in a promise, express or implied, the time of the transfer of property in goods depends upon the intention of the parties. The word 'intention' here means expressed intention. This becomes clear from sub-section (2) of Section 19. The question of passing of property is normally a question of intention and the intention of the parties must be gathered from the terms of the contract. As to when the parties intended the property in the goods to be transferred is essential one of fact, subject only to the rules of presumption for ascertainment of intention as indicated in Sections 20 to 24 of the Sale of Goods Act. [DAULATRAM RAMESHWARLAL VS. B.K. WADEYAR, 1957 (8) STC 617]

17.3 Under Section 19(2) of the Sale of Goods Act, for the purpose of ascertaining the intention, the Court shall have regard to :-

(a) the terms of the contract,
(b) the conduct of the parties, and
(c) the circumstances of the case.

The Court may also have regard to the usage of trade.

17.4 Section 62 of the Sale of Goods Act pertains to exclusion of implied terms and conditions. Where a contract of sale is silent, and expressly or impliedly makes no provision for all those conditions/warranties/or terms, which the Act would imply in a contract of that nature, the parties would have all such rights, duties and obligations as would arise under the contract of sale by implication of law. It is not necessary for the parties to make any mention in the contract of all those terms which the law will imply as having been incorporated in the contract. However, the Sale of Goods Act does not compel the parties to make a contract according to the law and, therefore, the parties may agree to any terms they please, provided that the contract does not become illegal. In other words, the parties may exclude any of the terms or conditions which the law usually attaches to a contract of sale and create for themselves any special rights, duties and obligations that they desire.

17.5 Section 64 of the Sale of Goods Act which deals with auction sale primarily provides that a sale is complete when the auctioneer announces its completion by the fall of the hammer and until such announcement is made any bidder may retract his bid; that where the goods are put up for sale in different lots, each lot is prima facie deemed to be the subject of a separate contract of sale. However, in light of the provisions of Section 62 of the Sale of Goods Act it is possible for the parties, by special agreement to vary some of the rights and obligations arising from such sale i.e. the auction sale under Section 64 wherein certain implications may arise.

17.6 Section 47 of the Sale of Goods Act lays down as to when an unpaid seller of goods has lien over the goods. The unpaid seller of goods who is in possession of the goods is entitled to retain possession of the goods until the buyer makes payment of price, and the circumstances entitling the unpaid seller lien over the goods are as stated in sub-section (1) of Section 47 of the Sale of Goods Act. However, under Section 49 of the Sale of Goods Act situations in which lien gets terminated are provided for. The unpaid seller of goods

loses his lien when he delivers the goods and the buyer obtains lawful possession. Hence "when the vendor has given the buyer possession under the contract of sale, all his rights in the goods are completely gone; he must recover the price exactly as he would recover any other debt (u), and has no longer any claims on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent unless, indeed, the whole transaction is vitiated by actual fraud"(v)." Source : Pollock & Mulla - The Sale of Goods Act, Fifth Edition.

18. Therefore, applying the aforesaid legal principles to the facts of the case it is apparent that Section 64 of the Act cannot be applied ipso facto without taking into consideration provision of Section 62 of the said Act. Once there is a statutory provision which permits that parties by special agreement can vary some of the rights and obligations arising from sale under Section 64 of the Act, the implications arising under Section 64 of the Act cannot be pressed into service in absolute terms.

19. On a conjoint reading of Sections 47 and 49 of the Sale of Goods Act, it is apparent that lien over goods sold can exist only in specified circumstances and once the possession passes even if the seller is not paid the price of the goods the lien is lost. Therefore, for the applicant to contend that provision of Section 19 of the Sale of Goods Act cannot come into play is not supported by any provision excluding the legal consequence. In fact as can be seen from the reply affidavit respondent No.7 has already entered into further contract of sale on being put into possession on payment of entire sale consideration. In these circumstances, it is not possible for the Court to lightly intervene by disturbing the concluded contract of sale. Mr.Joshi is correct to the extent when he submits that the Court has a discretion vested in it. But the discretion has to be exercised in light of the factual matrix available on record and the settled legal position. It goes without saying that the discretion of the Court is not unbridled and merely for asking the same cannot be exercised.

20. The applicant and its offer do not inspire confidence. It is submitted that the Court must make a probing inquiry to ascertain whether composite offer for

an amount of Rs.315 lacs or more may be received from the applicant and/or other bidders. If ultimately no other bidder appears, as in the past, it may happen that the applicant may claim that the property be sold to the applicant for the price offered; and even otherwise if some other bidder appears it is not sure as to whether the bid would go higher. For that matter even the applicant may bid or may not bid. Therefore, the application cannot be granted because the entire exercise would be in the realm of guesswork and as already stated hereinbefore, the secured creditors and the workmen would have to wait for realization of a reasonable price, and for how long one would not know. The assets which are already disposed of, being of a depreciable nature, it is not possible to accept the contentions raised on behalf of the applicant.

21. In the circumstances, the application stands rejected for the aforesaid reasons. The applicant shall pay costs to respondent Nos.1 and 2 quantified at Rs.2,500/- (Rupees Two thousand Five hundred only) each.

Sd/-

[D.A.MEHTA, J]

* * *

'Bhavesh'